United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

NO. 76-1041

B
Pets

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1041

UNITED STATES OF AMERICA,

Appellee,

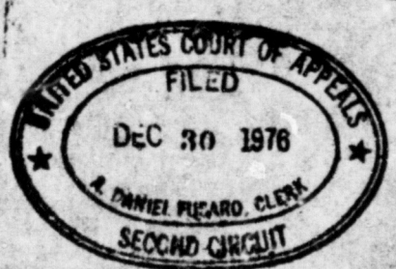
VS.

DAVID GUILLETTE and
ROBERT JOOST,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF CONNECTICUT

JOINT PETITION OF APPELLANTS FOR
REHEARING PURSUANT TO RULE 40 AND
SUGGESTION FOR REHEARING EN BANC
PURSUANT TO RULE 35



HUBERT J. SANTOS
Special Public Defender
51 Russ Street
Hartford, Connecticut
Attorney for David Guillette

JAMES A. WADE
Special Public Defender
799 Main Street
Hartford, Connecticut
Attorney for Robert Joost

FACTUAL BACKGROUND

On December 20, 1976, a panel of this Court (Van Graafeiland, C. J., Kelleher and Gagliardi, D. J.'s) affirmed the convictions and twenty-five year sentences of the Appellants, David Guillette and Robert Joost, for conspiracy to violate the civil rights of a Government witness, Daniel LaPolla, with death resulting. 18 U.S.C. §241. The Appellants were originally named in a three-count indictment along with William Marrapese and Nicholas Zinni in June of 1973. The affirmance by this Court was from the third trial of the Appellants.

Trial number one lasted for two and one-half months and resulted in verdicts of guilty on all counts and sentences by the Hon. T. Emmet Clarie of life imprisonment. On April 18, 1975, Judge Clarie ordered a new trial upon a determination that the key Government witness, John Housand, had perjured himself and that the Government had failed to turn over exculpatory material to the Appellants.

At trial number two, before the Hon. Jon O. Newman, Housand having recanted his testimony, William Marrapese now became the Government's chief witness against these Appellants. The jury deliberated five days but was unable to reach a verdict on the conspiracy, death-resulting count.

Trial number three in which Marrapese was again the key witness was held before the Hon. Lloyd F. MacMahon. The jury

convicted these Appellants on the conspiracy count, acquitted Guillette of the substantive count of planting a dynamite bomb and acquitted Zinni outright. Judge MacMahon imposed sentences of twenty-five years on each of these Appellants.

The Government's proof at all three trials consisted of: (1) an alleged meeting on May 8, 1972, at Carter's Jewelry Store in Cranston, Rhode Island wherein an agreement was reached to kill LaPolla; (2) various trips by the Appellants to the vicinity of LaPolla's home in Oneco, Connecticut; (3) airplane flights by the Appellants over LaPolla's home on September 23 and 24, 1972; (4) visits by the Appellants to the funeral and burial services of LaPolla's brother in Providence, Rhode Island on September 25 and 26, 1972; and (5) various alleged admissions by the Appellant Guillette to the alleged co-conspirator Marrapese, who became the Government's chief witness at trials two and three only after his sentence of life imprisonment was reduced to six years.

I

APPELLANTS WERE DENIED A FAIR TRIAL BY THE COURT'S CHARGE THAT THEY WOULD BE LIABLE FOR LAPOLLA'S DEATH EVEN IF LAPOLLA ACCIDENTALLY BLEW HIMSELF UP

LaPolla was killed on September 29, 1972, as the result of a dynamite explosion at his home in Oneco, Connecticut. At all three trials the Government contended that LaPolla triggered

a dynamite bomb when he opened his front door. The Appellants argued that LaPolla's death was an accident, to wit, that he was setting up a dynamite bomb as a trap for the Appellants, whom he feared, when it accidentally detonated. This possibility was originally entertained by Government investigators, and in part because of their efforts, the Appellants offered substantial evidence in support of this argument.

At trial number two, Judge Newman instructed the jury that:

> ... if the death were accidental, or if you are not persuaded beyond a reasonable doubt that it was deliberate the defendants cannot be found guilty of conspiracy with death resulting, although they could be found guilty of simple conspiracy.

At trial number three Judge MacMahon refused to follow Judge Newman's charge. Instead he charged the jury in the following language that the Appellants would be liable for LaPolla's accidental death if the jury believed the accident were induced or brought about by acts of the Appellants in furtherance of the conspiracy:

> Death results from the conspiracy charged in the indictment if it was caused by an act of one or more of the conspirators in furtherance of the purpose of the conspiracy.
>
> Death, whether accidental or intentional, does not result from the conspiracy if caused by LaPolla's own act, unrelated to the conspiracy or its purposes provided the death was not induced or brought about by some act of a conspirator in furtherance of the purposes of the conspiracy. Likewise, death, whether acci-

> dental or intentional, does not result from the conspiracy if caused by the acts of any person who was not a member of the conspiracy or even if it were caused by a member of the conspiracy but not in furtherance of its purpose or within the scope of the conspiracy.

In sustaining Judge MacMahon's charge, Judge Kelleher noted that the issue raised by Appellants "raises a substantial question concerning the scope of criminal culpability imposed by Section 241." United States v. Guillette and Joost at 6105. Appellants concur with this statement and submit that the issue "involves a question of exceptional importance", Rule 35, F.R.A.P., which requires a rehearing en banc.

The panel concluded that "under the common law even if LaPolla died from an explosion that he had accidentally caused, Appellants would still be considered in the chain of legal causation if the immediate cause of death ... setting a bomb as a booby trap ... was a forseeable protective reaction to their criminal efforts to locate and dissuade him from testifying." Id., at 6106-07.

Appellants recognize that under certain unique circumstances a defendant could be liable for an accidental death. For example, if a person is chased into a room and leaps out of an open window to avoid being stabbed, the assailant would be responsible for the death. This is so because of the proximity of cause and effect. This case totally lacks this element.

In summation, Appellants argued that LaPolla feared the Appellants because of the airplane flights on September 23 and

24, 1972 and the funeral home visits on September 25 and 26, 1972. As a result of this fear LaPolla went to his abandoned home and was in the process of setting up a booby trap bomb for these Appellants when it accidentally detonated. Judge MacMahon's charge permitted the jury to conclude that LaPolla's accident was induced or brought about by the plane flights and funeral home visits and therefore they were responsible for the death. The panel's rationale in upholding this charge leads to a ridiculous result.

For example, assume that two conspirators visit a witness and threaten to kill him if he testifies against them. As a result of the visit the witness decides to kill the conspirators before they kill him. The witness locates the conspirators and while in the process of preparing the weapon for killing them he accidentally shoots and kills himself. The panel's opinion would hold the conspirators liable for the witness' death if the accident were induced or brought about by the acts of the conspirators in furtherance of the conspiracy.

An even more absurd example can be formulated. Assume that the conspirators tell the witness he better be out of town by the next day or they will kill him. The witness gets into his automobile with the intention of leaving town. In the course of the trip he falls asleep at the wheel, the car runs into a tree and he dies. The panel would hold the conspirators liable.

Recognizing no doubt the logical weakness of the panel's position, the Government in its brief never advanced the position adopted by the panel. Instead, the Government argued that the Appellants were not entitled to an accidental death instruction because the evidence was not sufficient to support the same and that the instruction given constituted harmless error. Brief of the United States, at 55-57.

II

APPELLANTS WERE DENIED A FAIR TRIAL BY THE COURT'S FAILURE TO GIVE A REQUESTED ALIBI CHARGE

At all three trials of these Appellants, a central issue in dispute involved the allegation by the witness Marrapese that on May 8, 1972, a meeting was held at Carter's Jewelry Store in Cranston, Rhode Island, whereat an agreement was reached to kill LaPolla. Both Appellants denied that they participated in such a meeting and presented an alibi defense on this point. Guillette produced his brother-in-law and his wife to corroborate his testimony that he was staying at his brother-in-law's home at the time of the alleged meeting. Joost's alibi rested on his own testimony that he was home at the time of the meeting.

In granting a new trial, Judge Clarie wrote that "without that meeting, it would have been difficult, if not impossible, to prove that all four had agreed to do away with LaPolla." At

trial number two, Judge Newman was of the view that the meeting was so critical that he charged the jury as follows:

> Evidence has been introduced by some of the defendants to show that on the morning of May 8, 1972, they were at a location other than Carter's jewelry store. Guillette testified he was at the home of his brother-in-law, and Joost testified he was at his own home. I remind you that a defendant never has the burden of proving his innocence. If, after considering all of the evidence, you have a reasonable doubt as to whether a defendant was at the meeting at Carter's jewelry store on May 8, you must find that defendant not guilty of Count One, and you would not be able to use the joint venture or conspiracy theory in convicting that defendant on Counts Two or Three.

In affirming the conviction the panel refers to the meeting as "crucial" and "an important element in the prosecution's case." Id., at 6110.

At trial number three the Appellants requested Judge MacMahon to charge the jury in accordance with Judge Newman's charge. Judge MacMahon refused to give the charge or any variance thereof. The panel found the failure by Judge MacMahon to advise the jury of the unchanging burden of proof on the Government in an alibi case to be harmless error. Id., at 6112. The panel was of the view that the requested instruction was too sweeping and misleading and not in writing. Id., at 6112. It should be noted that the request was in writing, the Appellants having submitted Judge Newman's typed charge as their request to charge.

The panel suggests that had the defense only requested the following language, reversal would have been mandated by United States v. Burse, 531 F.2d 1151 (2d Cir. 1976): "I remind you that a defendant never has the burden of proving his innocence [when an alibi defense is proffered]." The defense did request this language together with the other language quoted above.

The Court should grant a rehearing en banc "to secure or maintain uniformity" (Rule 35 F.R.A.P.) with its decision in United States v. Burse, supra. In Burse a panel of this Court (Kaufman, Smith and Anderson) held the trial court's failure to give a requested alibi instruction to be reversible error on a charge of conspiracy to commit bank robbery. The panel in Burse noted that while Burse's presence "at the scene of the crime was not necessary for his conspiracy conviction, the prosecution's theory of the case rested heavily on Burse's alleged presence at the scene of the robbery..." Id., at 1153. The same is true with regard to the May 8th meeting. As in Burse, supra, the evidence was "less than overpowering." Id., at 1153. At trial number two of these Appellants, the jury deliberated more than five days and could not reach a verdict. At trial number three, the jury acquitted Zinni since his only involvement was his alleged presence at the May 8th meeting.

The instant appeal is unlike United States v. Coughlin, 514 F.2d 904 (2d Cir. 1975) where no alibi charge was requested.

It is respectfully submitted that the trial judge was put on sufficient notice by the written request and could have given some form of the requested alibi charge if he did not agree with the exact language of the charge as submitted.

III

APPELLANTS WERE DENIED A FAIR TRIAL BY THE TRIAL COURT'S REFUSAL TO ADMIT AN ADMISSION BY ANTHONY SOUCA THAT HE KILLED LaPOLLA

Prior to the commencement of trial number one, a Government informant advised Federal agents that he had a conversation at a bar in New York City with a person who identified himself as Anthony Souca. Souca told the informant that he killed Daniel LaPolla for William Marrapese by blowing him up. At the suggestion of the defense, Judge Clarie conducted an in camera examination of the information and a transcript was prepared of that examination. To date, the Government has refused to disclose the identity of the informant to the defense.

At all three trials the Appellants argued that it was Marrapese who hired a paid assassin to kill LaPolla. Judge Newman, at trial number two, gave the Government the option of producing the informant or having the transcript read to the jury. When the Government refused to produce the informant, the transcript was read. Judge MacMahon refused to follow Judge Newman's ruling and instead excluded the evidence as hearsay.

The Appellants' claim that Souca's hearsay declarations constitute admissions against his penal interest and are admissible under Federal Rule of Evidence 804(b)(3). Sustaining Judge MacMahon's ruling, the panel was of the view that the admissions lacked sufficient corroborating evidence of trustworthiness. The panel emphasized that the "requirement of corroboration was written into the Rule to guard against the inherent danger that third-party confessions tending to exculpate a defendant are the result of fabrication." Id., at 6116.

Under the facts of this case the Souca admissions constituted a two-edged sword and did not suffer from the infirmity of fabrication. On the one hand, the Appellants considered the Souca admissions the cornerstone of their defense that Marrapese engineered LaPolla's death independent of them. If the jury, however, believed that the Appellants and Marrapese conspired to harm or kill LaPolla, they would be bound by Marrapese's act of hiring Souca to kill LaPolla. For this reason the Souca admissions did not constitute complete exculpation of the Appellants and satisfied the corroboration standards of Chambers v. Mississippi, 410 U.S. 284 (1975).

IV

THE INDICTMENT RETURNED AGAINST THE APPELLANTS WAS PERMEATED WITH PERJURIOUS TESTIMONY

The indictment returned against the Appellants in June of 1973 was based in substantial part on the testimony of John

Housand, the key Government witness at trial number one. Subsequent to trial number one Housand appeared before a new grand jury and recanted his trial testimony and his prior grand jury testimony. Prior to trials two and three, in which Housand would no longer be a witness, defense counsel moved to dismiss the indictment and implored the Government to seek a new indictment based on the Marrapese version of events, a course the prosecution elected not to pursue.

The panel sustained Judge MacMahon's denial of the motion to dismiss on the ground that "there is no evidence therefore that Housand actually committed perjury during his grand jury appearance." Id., at 6114. It is assumed that the panel means that no one can be sure that Housand was telling the truth when he testified before the second grand jury that he had lied before the first grand jury. However, it is not the prosecutor's function to gauge credibility -- that is the grand jury's prerogative.

No prosecutor can be absolutely certain when a witness tells him he lied on a prior occasion that he is then telling the truth. It is submitted, however, that when a witness recants under oath, and the Government has a new witness (Marrapese) to take his place, the proper procedure requires application for a new indictment. These Appellants agree with the rule enunciated in United States v. Gallo, 394 F. Supp. 310 (D. Conn. 1975) that a defendant "cannot be permitted to stand trial on an indictment which to the Government's knowledge may have been founded on

perjured testimony." (emphasis supplied) Id., at 315. This Circuit has been a leader in returning the grand jury to its historical function. United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972). It should not permit the Government to try defendants on an indictment based upon recanted testimony when an ample opportunity was available to seek an untainted indictment.

CONCLUSION

In view of the importance of the issues noted above, it is requested that the Appellants be granted a rehearing on the claims raised herein and in their main brief and it is respectfully suggested that such rehearing be conducted en banc by the entire panel of this Court.

APPELLANT, David Guillette

By Hubert J. Santos
HUBERT J. SANTOS
Special Public Defender
51 Russ Street
Hartford, Connecticut
His Attorney

APPELLANT, Robert Joost

By James A. Wade
JAMES A. WADE
Special Public Defender
799 Main Street
Hartford, Connecticut
His Attorney

Dated: December 29, 1976

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing JOINT PETITION OF APPELLANTS FOR REHEARING PURSUANT TO RULE 40 AND SUGGESTION FOR REHEARING EN BANC PURSUANT TO RULE 35 was mailed, first class, postage prepaid, this 29th day of December, 1976, to Paul Coffey, Esquire, Special Attorney for the Justice Department, 450 Main Street, Hartford, Connecticut.

James A. Wade

JAMES A. WADE